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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LOUIE FARIAS,

Defendant and Appellant.

F076339

(Super. Ct. No. BF161674A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

Sandra Gillies, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Amanda D. Cary and Jennifer Oleksa, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Poochigian, Acting P.J., Meehan, J. and DeSantos, J.

Appellant, Jose Louie Farias, pleaded guilty to four child sex abuse charges and admitted a prior strike conviction. On appeal, appellant contends the trial court should have granted his request to dismiss the prior strike conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). We conclude the trial court's denial of the request was not an abuse of discretion. Appellant also contends his case should be remanded in light of recently enacted Senate Bill No. 1393, to enable the trial court to exercise its discretion to consider striking his Penal Code<sup>1</sup> section 667, subdivision (a) enhancement. We agree and remand the case to the trial court for resentencing, and in all other respects affirm.

### **PROCEDURAL AND FACTUAL BACKGROUND**

Appellant regularly sexually abused his stepdaughter for six years, beginning in 2005 when she was five years old. Appellant engaged in numerous acts of abuse, including digital penetration and oral copulation, in appellant's bedroom and the victim's bedroom.

Appellant pleaded guilty to three counts of oral copulation or sexual penetration of a child 10 years or younger (§ 288.7, subd. (b)), and one count of continuous sexual abuse of a child (§ 288.5, subd. (a)). Appellant also admitted he suffered a 1996 conviction for first-degree burglary (§ 459), a prior strike conviction within the meaning of section 667, subdivisions (b) through (i), and a prior serious felony pursuant to section 667, subdivision (a).

Appellant was sentenced on August 16, 2017. At sentencing, appellant requested the court dismiss his strike pursuant to *Romero*. The court denied the request, articulating two reasons for the denial. First, the court noted that although the strike was 22 years old, appellant began molesting the victim in 1995, when the strike was less than 10 years old. Second, the court stated appellant's new offenses constituted an egregious course of

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<sup>1</sup> All further statutory references are to the Penal Code.

conduct lasting six or seven years, stopping only when appellant lost access to the victim. After denying the request, the court sentenced appellant to 90 years to life plus 44 years in state prison. The sentence included an additional five years for the section 667, subdivision (a) enhancement as to each of the four counts.

We originally filed our opinion in this case on October 31, 2018. However, appellant filed a petition for rehearing for the court to consider whether his case should be remanded for resentencing in light of Senate Bill No. 1393. On November 13, 2018, we granted appellant's petition for rehearing and vacated this court's opinion filed on October 31, 2018.

## **DISCUSSION**

### **I. Denial of Appellant's *Romero* Motion**

Appellant contends the trial court abused its discretion by denying the request to dismiss his prior strike conviction. We disagree.

“[A] judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.” (§ 1385, subd. (a).) This provision “permit[s] a court acting on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes law.” (*Romero, supra*, 13 Cal.4th at pp. 529–530.) “[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, ... the court ... must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*); accord, *People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).)

“[A] trial court’s refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion.” (*Carmony, supra*, 33 Cal.4th at p. 375.) “In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ‘ “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” ’ [Citation.] Second, a ‘ “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’ ” ’ [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at pp. 376–377.)

Appellant argues the trial court should have dismissed his prior strike conviction for numerous reasons: the remoteness of his prior strike conviction, his otherwise sparse criminal record, the length of his sentence even if the strike was dismissed, his assertion he is unlikely to reoffend, his expression of remorse at sentencing, and his background, character, and prospects upon release. While these factors would be relevant to a trial court’s analysis, they carry limited weight in determining whether a trial court abused its discretion. An abuse of discretion will only be found in limited circumstances, such as where a trial court is unaware of its discretion, considers impermissible factors in the exercise of that discretion, or renders a decision “so irrational or arbitrary that no reasonable person could agree with it.” (*Carmony, supra*, 33 Cal.4th at pp. 375-376.) Instead of articulating how the trial court allegedly abused its discretion, appellant seeks to relitigate the trial court’s decision.

The trial court considered appropriate factors in denying appellant’s request to dismiss his strike. First, the court considered the length of time between the strike and

the current offenses. (*Williams, supra*, 17 Cal.4th at p. 163; *People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.) It noted that although appellant's strike was 22 years old, appellant's criminal conduct in the new case began only ten years after the prior conviction. Next, the court considered the nature of appellant's new offenses, and reasoned the egregious nature of the repeated sexual abuse he inflicted on his victim did not warrant excepting appellant from the Three Strikes sentencing scheme. (*Williams, supra*, 17 Cal.4th at p. 161; *People v. Banks* (1997) 59 Cal.App.4th 20, 23 ["Nor do we doubt discretion may be exceeded when a defendant's instant crime is horrific ...."]) Although the court did not discuss every conceivable factor on the record, "[t]he court is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

We find the trial court's decision not to dismiss the strike, on its consideration of appropriate factors, was not so irrational or arbitrary that no reasonable person would agree with it. Even if we disagreed with the trial court's conclusion, our role is to determine whether it abused its discretion, not to substitute its judgment with our own.

## **II. Senate Bill No. 1393**

Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Senate Bill No. 1393) (Stats. 2018, ch. 1013, §§ 1, 2), signed into law September 30, 2018, and effective January 1, 2019, amended sections 667 and 1385 to give trial courts discretion to strike serious prior felony allegations made pursuant to section 667, subdivision (a). Appellant and the People agree Senate Bill No. 1393 is applicable to those parties like appellant whose appeals were not final on the law's effective date.

We agree with the assessment of both parties. Senate Bill No. 1393 applies retroactively to cases not yet final on appeal because it lessens potential punishment for certain offenses within the meaning of *In re Estrada* (1965) 63 Cal.2d 740, 745. Appellant was sentenced prior to the enactment of Senate Bill No. 1393, so the trial court lacked the discretion to strike section 667, subdivision (a) enhancements. Therefore, the

matter is remanded for the trial court to consider exercising discretion to dismiss his section 667, subdivision (a) enhancement.<sup>2</sup>

### **DISPOSITION**

The sentence is vacated, and the case is remanded to the trial court for resentencing in light of the amendments to Penal Code sections 667 and 1385 by Senate Bill No. 1393. The judgment is otherwise affirmed.

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<sup>2</sup> We do not express any view about how the trial court should exercise its discretion on remand.